In the Supreme Court of the United States.

October Term, 1901.

No. 222.

(18,014.)

LUCIAN WOODWORTH, FRANK D. BROWN AND GEORGE N. CLAYTON,
Plaintiffs in Error and Appellants,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error and Appellee.

On a Certificate from the United States Circuit Court of Appeals, for the Eighth Circuit.

Brief for Defendant in Error and Appellee.

HOWARD KENNEDY, JR.,
Counsel for Defendant in Error and Appellee.

MAY IT PLEASE THE COURT:

In the statement of facts prepared by counsel for plaintiffs in error and appellants herein, it is said that this suit "originally was brought by The Northwest-

ern Mutual Life Insurance Company against Lucian Woodworth, as principal, and Frank D. Brown and George N. Clayton, as sureties, on a supersedeas bond, to recover damages and costs which the Insurance Company alleged had been sustained by reason of an appeal taken by Lucian Woodworth from a decree of foreclosure and sale of real estate in Omaha, Nebraska." Pp. 1, 2 of brief of plaintiffs in error and appellants.

This statement is not correct. The appeal in which the supersedeas bond was given was taken not from "a decree of foreclosure and sale," but from something very different, namely, an order confirming a judicial sale of real estate and directing the immediate execution of a deed and the delivery of the possession of the premises to the purchaser at such sale. The distinction between such a decree and such an order is a very real one, and is of vital importance in the determination of the question now presented to this court. It is a distinction which counsel for plaintiffs in error ignores, but which, if recognized, will completely harmonize the authorities upon which he relies, with the principle contended for by the defendant in error.

ARGUMENT.

The question certified to this court for decision requires a determination, first, of the effect had upon the respective rights of the parties by the order of confirmation from which the appeal was taken—which is a matter of local law; and, second, of the

scope and effect of the supersedeas bond—which is dependent solely upon the statutes of the United States in that behalf, and the rules of court adopted in pursuance thereof.

I

As to the effect upon the respective rights of the parties of the order of March 15, 1898, by which the circuit court confirmed the report of sale, directed that the master convey to the purchaser the real estate so sold, and awarded a writ of possession to put said purchaser in possession thereof. P. 2 of certificate.

In Nebraska the common law theory of mortgage does not obtain. It is provided by statute that, "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." Sec. 55, Chapter 73, Compiled Statutes of Nebraska. The effect of this legislation, it is said by the supreme court of Nebraska, is to declare "that mortgages in this State shall be viewed only in the aspect created by and known to equity, simply as a pledge or security of a debt." *Kyger v. Ryley*, 2 Neb., 20, 25. That is to say, a mortgage of real estate creates a lien upon the mortgaged property but conveys no title and vests no estate, either before or after condition broken. The rents and profits belong to the mortgagor, or his successor in interest, until his rights thereto are terminated by the procedure provided by law. On this proposition there is no dispute.

In behalf of plaintiffs in error, it is insisted that the mortgagor's legal title to the mortgaged premises

is not and cannot be divested until the master's deed is delivered to the purchaser, and that until such time the mortgagor is entitled to receive and hold to his own use, the rents, issues and profits.

It is no doubt true that until the delivery of the master's deed the legal title to the premises remains in the mortgagor, but it is no less true that, in Nebraska, *upon confirmation of the sale*, the ownership of the premises and the incidents of ownership, including the right to the rents, issues and profits, become in equity vested in the purchaser, and that upon the subsequent execution and delivery of the master's deed the title thereby conveyed relates back to the date of the confirmation of the sale.

The general equitable rule goes even farther and carries the title back by relation to the date of the sale, so as to award to the purchaser the intermediate rents.

It is said by Judge Dillon, "It is true that no title passes until the sale is confirmed (*Williamson v. Berry*, 8 How., 546; *re O'Fallon*, 2 Dillon, 548). But when the sale is confirmed, if there are no equitable circumstances, and no statute to change the general rule, the rights of the purchaser relate back to the date of the sale, so as to entitle him to the rents and profits for the intermediate period." *Lathrop v. Nelson*, 4 Dillon, 194, 196. In the case just cited, the sale was made May 8, 1875, confirmed February 28, 1876, and a deed executed and delivered February 29, 1876. It not appearing that the delay in securing confirmation was attributable to the mortgagee, who was the

purchaser at such sale, it was held that he was entitled, as against the mortgagor's assignee in bankruptcy, to the rents and profits of the estate sold from the date of the sale.

Such is the settled doctrine of the English courts, *Anson v. Towgood*, 1 Jac. & Walk., 637, 639; *Vesey v. Elwood*, 3 Dru. & War., 74; and of the following American authorities, among others, *Taylor v. Cooper*, 10 Leigh, 317; *Wagner v. Cohen*, 6 Gill, 97; *Stevenson v. Hancock*, 72 Mo., 612; *Wimpfheimer v. Prudential Insurance Co.*, 56 N. J. Eq., 585; *Jashenosky v. Volrath*, 59 Ohio St., 540.

In Nebraska, however, it is held that (although for some purposes the title relates back to the date of the mortgage) for the purposes of ownership and the right to the rents, issues and profits, the title of the purchaser relates back only to the date of the *confirmation* of the sale, and it is the value of the rents and profits from the date of the confirmation only that the Insurance Company is seeking in this case to recover.

Sales upon execution, in Nebraska, closely resemble judicial sales and are subject to examination and confirmation by the court; nor may the sheriff's deed issue until such sale has been first confirmed.

It has been held by the Nebraska supreme court that "under our statute governing sales of real property on execution, the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not cer-

tainly divested." *State Bank v. Green*, 10 Neb., 130, 134, 135. "On the other hand the sheriff who makes the sale is by law required and in duty bound to make a deed to the purchaser after the confirmation and order to the effect." *Phillips v. Dawley*, 1 Neb., 320, 322. "Under our code a purchaser of real estate at execution sale, who has paid the purchase price, and the sale has been confirmed, is the *equitable owner* of the property, and may compel the officer, if need be, to execute a deed therefor." *Lamb v. Sherman*, 19 Neb., 681, 687.

It is the doctrine of these cases that when an execution or judicial sale has been made and reported to the court, the purchase price paid, the report examined, the sale confirmed and delivery of a deed ordered, thereupon the *equitable ownership* of the property, with all of the incidents and rights of ownership, vests immediately in the purchaser, and that there is left in the execution debtor, or mortgagor, only the naked legal title which he thenceforth holds as a trustee for the benefit of the purchaser. The right to a conveyance, upon confirmation of sale, is immediate and absolute—in the absence of fraud or other ground of equitable interposition—and this right carries with it the right to the reception of the rents and profits.

The precise question has been passed upon by the supreme court of Nebraska, which expressly held that the title of a purchaser at a judicial sale relates back to the date of the order of confirmation, and that such purchaser is entitled to an accounting for the rents from such date.

Clark & Leonard Investment Co. v. Way, 52 Neb., 204, 207.

In the case just cited, there had been a judicial sale of mortgaged premises, subject to a prior mortgage, and such sale had been confirmed by the district court. From the order of confirmation the mortgagors appealed to the supreme court of the State, but after the case had been there pending for about a year, they dismissed their appeal. They then filed in the court below a motion for an order to require the purchaser at the sale to pay into court a certain sum alleged to remain due on his bid. From the order entered sustaining said motion and requiring him to pay a certain sum into court, the purchaser appealed to the supreme court. The purchaser urged as a reason for declining to pay any further money upon his bid, that pending the appeal he had paid certain taxes which during such period had become liens on the premises, and certain interest which had accrued on the mortgage subject to which he had bought; and that these amounts aggregated more than the balance due on his bid. The court disallowed these items, holding that upon the dismissal of the appeal—which was equivalent to the affirmance of the order from which the appeal was taken—the title of the purchaser, for all purposes, related back at least to the time of the order of confirmation made by the lower court; that the property became the purchaser's property from that time; and that the interest thereafter accruing on the first mortgage subject to which he purchased, and the taxes thereafter accruing, were

charges for which he and not the mortgagor was responsible. The court further held that "*undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation.*" *Id.*, p. 207.

The cases cited in the brief of plaintiffs in error are not in the least inconsistent with this doctrine.

In *Orr v. Broad*, 52 Neb., 490, the question arose as to the respective rights of the purchaser at an execution sale of mortgaged premises and the mortgagee who was in possession under an assignment of rents executed and delivered to him by the mortgagor the day after the levy of the execution. It was held that the purchaser at the execution sale had the superior right pending the foreclosure of the mortgage; that such purchaser by the confirmation of the execution sale and the deed made pursuant thereto was vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land; and that his "title and right thus acquired were liable to extinguishment by the foreclosure of the mortgage, a sale under the decree and confirmation thereof; but *until the occurrence of the last mentioned event* he had the legal title and right to possession." *Id.*, pp. 497, 498. In the brief of counsel for plaintiffs in error, emphasis is placed upon the statement that the purchaser at the execution sale became vested with the title and right of the judgment debtor by the confirmation of the sale, "and the deed made pursuant thereto." The delivery of the deed and the confirmation of the sale took place on the same date, so that the language used was entirely applicable to

the facts of that case but cannot be tortured into a repudiation of the doctrine of relation previously laid down by the court.

The cases of *Clark v. M. K. & T. Trust Co.*, 59 Neb., 53, and *Huston v. Canfield*, 57 Neb., 345, are similar to *Orr v. Broad, supra*, and follow that case.

Another case on which much stress is laid by counsel is *Philadelphia Mortgage & Trust Co. v. Gustus*, 55 Neb., 435. This was decided on an application to the supreme court for leave *to redeem from a foreclosure sale pending an appeal from the order of confirmation, with supersedeas.* The motion was allowed in accordance with the liberal construction accorded to statutes allowing the redemption of mortgaged premises. It is urged that this case decides that the owner of property is entitled to the rents and profits of the same until final transfer of the title by the master's deed. We do not so read the decision. The only thing decided by the court and all that could be decided is that where an order confirming a sale under a decree of foreclosure has been superseded by the execution and approval of a proper bond, the mortgagor may redeem from such sale at any time prior to the decision of the appellate court, affirming the order of confirmation. The appeal and the bond given to supersede the order appealed from were effective to suspend the execution of the order and to render it inoperative *during the pendency of the appeal.* While so suspended, redemption was allowed under the statute. But this holding does not disaffirm the view that when the supersedeas is discharged by

the dismissal of the appeal or the affirmance of the order of the lower court, the order appealed from becomes effective and the rights it confers become operative as of the date of such order.

In none of these cases is there any reference to the doctrine of relation and none of them announces or applies any principle which is inconsistent with that doctrine as laid down in *Clark & Leonard Investment Co. v. Way, supra.*

Neither do the cases from the United States courts cited in behalf of the plaintiffs in error in any wise conflict with this view. They simply declare and enforce the general equitable doctrine of mortgage, a doctrine which the defendant in error does not dispute nor question.

In *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S., 603, 23 L., 405, it was held that where mortgages of a railroad gave to the mortgagees the right to intervene and take possession of the road and receive its income and earnings, but the mortgagees did not exercise that right, and in the suit brought to foreclose the mortgages no order was made affecting the possession and earnings pending the foreclosure, the mortgagor retained the possession and the right to the income and that such income was liable to the creditors of the company, as if there had been no mortgage. The income in dispute was received between the time of the decree and the time of sale. The question as to the right of a purchaser of the road to receive the income earned after the

confirmation of the sale, was not before the court and was not passed upon.

In *Teal v. Walker*, 111 U. S., 242, 28 L., 415, it was held only that a mortgagor or his grantee in possession of mortgaged premises was not accountable to the mortgagee for rents received by him after default but prior to the sale in foreclosure, even though the mortgage provided that on default the mortgagee should be entitled to the possession, such a stipulation being contrary to the public policy of the state where the land was situated.

In *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, 27 L., 609—a case which will be hereinafter further examined—the bond in suit was given on appeal from a *decree of foreclosure*, not from an *order confirming a sale*; and it is there shown that the right of a mortgagor to the possession of mortgaged premises, and to the rents and profits, is not affected by a decree of foreclosure and sale; that such a decree simply directs the sale of the land mortgaged, in order that the proceeds may be applied to the debt; and that "perception of rents and profits is the mortgagor's right until a final determination of the right to sell and a sale made accordingly." This certainly is far from holding that *after* a sale made and confirmed the mortgagor may continue to receive the rents and profits without being accountable therefor to the purchaser.

The effect of the order of confirmation must be determined by the laws of Nebraska, and therefore a consideration of the New York cases cited in behalf

of plaintiffs in error is perhaps unnecessary. But it may be observed that they too are easily distinguishable from the present case.

In New York (at the dates in question) the master's report of sale, in foreclosure suits, and, of course, the order of confirmation, *followed* the execution and delivery of the deed.

In *Clason v. Corley*, 5 Sandf., 447, the rent, which was sought to be recovered, fell due May 1, 1848, and was for the quarter ending on that day. The price of the premises was not paid until May 2, 1848, and the deed was executed and delivered the same day. An order of confirmation *nisi* was entered May 24, 1848, which became absolute June 2, 1848, or more than a month after the rent sued for became due.

In *Whalin v. White*, 25 N. Y., 462, it did not appear that the sheriff's deed had ever issued, or that the sale had been confirmed.

In *Mitchell v. Bartlett*, 51 N.Y., 447, the sale took place on October 4, 1864, at which time 10 per cent of the bid was paid, and a memorandum was signed by the purchaser agreeing that the balance of the purchase price should be paid and the deed delivered November 1, 1864. The deed was ready for delivery on the date named, but the purchaser was not ready with the purchase money and did not in fact pay the balance due nor receive his deed until August 2, 1865, the delay being due solely to his own fault. The court, properly, held that the contract of sale was not complete as to the purchaser until the whole price was paid and that the purchaser's title could relate

back only to the time when his right to receive the deed became absolute.

In *Harrigan v. Golden*, 41 App. Div., 423, it appears that the purchaser at a partition sale had paid 10 per cent of the purchase price and had signed a memorandum of purchase, but before the date fixed for the completion of the sale, a building situated upon the premises was destroyed by fire, thus causing a large depreciation in the rental value of the property and it further appears that the local authorities forbade the erection of another building to take the place of the one destroyed. It was held that the purchaser should not be compelled to complete his purchase, because the referee was not in position to give a title to all the property which he undertook to sell and which the purchaser rightfully supposed he was to receive.

And it is held in New York that the deed passes title to the purchaser at the moment of delivery although the report of sale be not made and confirmed until some time afterward, and that even if it were otherwise the subsequent confirmation of the sale would relate back to the delivery of the deed and give it effect from that time.

Fuller v. Van Geesen, 4 Hill, 171.

In *Nellis v. Lathrop*, 22 Wend., 121, 122, 125, an action for rents, it was held that where the defendant became entitled to receive a sheriff's deed of certain property on October 4, 1833, as redeeming creditor, but was delayed in obtaining the deed until February 28, 1835, by reason of an injunction ob-

tained by the assignor of plaintiff, such deed under the doctrine of relation must be deemed to have been delivered on October 4, 1833, and that plaintiff was divested of his title, as of that day.

It is the doctrine of these New York cases that the purchaser's title becomes effective *when his right to a deed accrues.* This accords with the contention of the Insurance Company in the present case. The confirmation of the sale establishes absolutely the purchaser's right to a deed. The order itself directs the immediate delivery of the deed and of the possession of the premises to the purchaser. Even without a specific direction to that effect the purchaser would be entitled to the possession of the premises.

Horn v. Volcano Water Co., 18 Cal., 141, 143.

Kershaw v. Thompson, 4 Johns. Ch., 609.

Accordingly, the effect of the order of confirmation of March 15, 1898, was to invest the Insurance Company with the complete equitable title to the premises, which title upon the subsequent delivery of the master's deed became effective, by relation, from the date of said order and entitled the Company to an accounting for the rents, issues and profits received by the mortgagor during the period between the confirmation of the sale and the delivery of the deed.

II

As to the scope and effect of the supersedeas bond.

The effect to be given to the supersedeas bond and the scope of the protection afforded by it to the

defendant in error and appellee, are questions to be determined by the law of the United States.

The act of Congress in this behalf directs that good and sufficient security be taken "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution." Sec. 1000, Rev. Stat., U. S.

Rule 13 of the circuit court of appeals of the eighth circuit, following rule 29 of this court, provides that "in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of suit and just damages for delay, and costs and interest on the appeal."

In *Catlett v. Brodie*, 9 Wheat., 553, 6 L., 158, Mr. Justice Story, speaking for the court and construing the word "damages" as used in Sec. 22 of Ch. 20 of the judiciary act of 1789, Sec. 1000 of the Revised Statutes, says (page 554): "The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. What-

ever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security."

The purpose of the statute and of the rules of court is to indemnify the defendant in error, or the appellee, for *whatever losses he may sustain* by the suspension of the judgment or decree. It is evident that the character and amount of these losses will depend largely upon the nature of the order which was superseded.

The order in this case confirmed a sale of real estate, directed the immediate execution of a deed thereto and delivery of possession thereof to the purchaser. Had the order not been superseded or stayed, it is plain that delivery of the master's deed and of the possession of the property would have immediately followed. It would seem clear that the natural and immediate consequence of the supersedeas was to deprive the purchaser of such possession during the pendency of the appeal and that the value of such possession, or of the rents and profits of the property, is the measure of the losses or damages thereby sustained.

The circuit court recognized these damages and allowed a recovery accordingly.

It is urged by counsel for plaintiffs in error that such recovery may not be had and that the case of *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, 27 L., 609, is decisive authority in support of his conten-

tion. The rule there announced, however, is not applicable to the question now submitted to the court.

That was an action on an appeal bond given to supersede a decree of foreclosure rendered by the circuit court for the district of Nebraska, and affirmed on an appeal to this court. The court there held that a supersedeas bond given on an appeal from a *decree of foreclosure* in the courts of the United States does not operate as security for the rents and profits or use and detention of the property pending such appeal. The ground of this decision, as appears from Mr. Justice Bradley's opinion, is that the decree of foreclosure, from which the appeal was taken, gave to the mortgagee no right to the possession of the mortgaged premises, nor to the rents and profits thereof, and that accordingly, so far as such rents were concerned, the mortgagee was deprived of nothing and suffered no injury by the appeal.

As is stated by the learned Justice:

"The plaintiff, in this case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him.

Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond, But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly." *Id.*, pp. 392, 393; L., p. 615.

But Justice Bradley himself recognized that there may be a different rule where the judgment or order appealed from awards the possession of the property.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property, of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged." *Id.*, p. 392; L., p. 615.

Indeed the reasoning employed by Justice Bradley, and the very ground of his decision, supports exactly the contrary of the contention of plaintiffs in error, namely, that such a bond WOULD cover rents and profits in a case where the judgment or decree super-

seded determined the title of real property or transferred the right of possession of the same.

In *Roberts v. Cooper*, 19 How., 373, 15 L., 687, it was questioned by this court, as stated by counsel for plaintiffs in error, whether a bond in ejectment cases covers rents and profits accruing pending the writ; but the language just quoted from the opinion of Justice Bradley, in *Kountze v. Omaha Hotel Co.*, *supra*, indicates clearly that it *does*, since "if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him."

And so at circuit ruled Mr. Justice Brewer, then circuit judge, in *St. Louis Smelting & Refining Co. v. Wyman*, 22 Fed., 184, where the question was squarely presented for decision.

That was an action on a supersedeas bond given in an ejectment case in the United States circuit court, and the sole question before the court was whether the bond covered the value of the use and occupation or the rents and profits of the land for the period between the judgment of the circuit court and the affirmance of the same by this court.

In the course of his opinion the learned judge says:

"But for language to be found in one or two opinions of the supreme court, I do not think there would be the slightest question.

The section of the statute, which is in Desty, (section 1000,) provides that every justice or judge

signing the citation shall take good and sufficient security that the plaintiff in error shall answer all damages and costs where the writ is a *supersedeas*. That he shall answer *all* damages! Now, when the judgment is entered in the circuit court, the right of the plaintiff to the possession of the property is established. He is entitled to the immediate possession and to the rents and profits that thereafter shall arise therefrom. If by proceedings in error and a *supersedeas* bond he is deprived of that possession, and so, pending the proceedings in error, loses those rents and profits, certainly he is damaged to that extent; and if the *supersedeas* bond is to answer all damages, it should answer for those rents and profits. I do not see any logical escape from that reasoning." *Id.*, p. 185. After distinguishing *Kountze v. Omaha Hotel Co.*, *supra*, Judge Brewer, following "the clear and unanswerable logic" of the case, held that "a *supersedeas* bond in an ejectment case covers rents and profits accruing pending the proceedings in error," and gave judgment accordingly.

The supreme court of Utah, in an action upon a supersedeas bond, given in pursuance of section 1000, Rev. St. U. S., in error proceedings to this court to review a judgment of ejectment entered by the supreme court of the territory of Utah, in construing such bond in connection with the statute and with the rules of this court, after carefully reviewing the authorities, distinguished the cases of *Roberts v. Cooper*, *supra*, and *Kountze v. Omaha Hotel Co.*, *supra*,

and approved and followed the decision of Judge Brewer in *Refining Co. v. Wyman, supra.*

Tarpey v. Sharp, 12 Utah, 383.

The supreme court of Pennsylvania, in a recent case, without having its attention directed to either *Refining Co. v. Wyman*, or *Tarpey v. Sharp*, arrived independently at the same conclusion and distinguishing *Roberts v. Cooper*, and *Kountze v. Omaha Hotel Co.*, in an action upon a bond given under said section 1000, Rev. St., and in pursuance of rule 29 of this court, to supersede a judgment in an ejectment case in the United States circuit court, held that recovery could be had of damages for the use and detention of the land pending the error proceedings.

Gleeson's Estate, 192 Pa. St., 279.

Similarly, it has been frequently held that supersedeas bonds given in the state courts, conditioned for the payment of "all damages" cover rents and profits accruing pending an appeal or error proceedings in an action for the recovery of real estate or the possession thereof.

Cahall v. Building Ass'n., 74 Ala., 539.

Hays v. Wilstach, 101 Ind., 100.

Green v. Sternberg, 15 Mo. App., 32, 35.

Turner v. Johnson (Ky.) 50 S.W., 675.

So this court, applying similar reasoning, has held that where, by writ of error and suspension bond (conditioned to answer all damages and costs), the enforcement of a judgment of ouster from office was prevented and until the writ was dismissed the relator

was excluded from the office and deprived of the salary annexed to it, the amount of the salary received by the defendant during the period of such deprivation, constitutes the measure of the damages which the plaintiff is entitled to recover upon the suspension bond.

United States v. Addison, 73 U. S. (6 Wall.), 291, 18 L., 919.

There is certainly a strong analogy between a judgment of ouster or a judgment of ejectment and a decree or order confirming a judicial sale, directing the immediate execution of a deed and the delivery of the possession to the purchaser, and it seems but reasonable to apply the same rule to each case, and to hold that the damages recoverable are measured by the value of the use and possession during the period such possession was withheld by reason of the supersedeas.

Besides *Kountze v. Hotel Co.*, *supra*, counsel cites to the same point three cases. None of these, however, supports his contention.

National Bank of Rondout v. McGahan, 45 Fed., 280, was heard on a motion to fix the amount of a supersedeas bond and holds the rule laid down in *Kountze v. Hotel Co.* to be inapplicable because the decree to be appealed from was not a decree simply for the foreclosure of a mortgage and the court there limits the authority of the latter case to an appeal from a decree of foreclosure only.

Mercantile Trust Co. v. Mo. K. & T. Ry. Co., 36 Fed., 221, 226, was decided upon an application for a

receiver in a bill filed to foreclose a mortgage. As an additional reason for granting the application Justice Brewer cites *Kountze v. Hotel Co.*, to the point that should the suit pass to a decree [of *foreclosure*] and the defendant appeal therefrom, the bond on such appeal would be no protection to the mortgagee in respect to rents and profits—a proposition which we do not dispute.

The Sydney, 47 Fed., 260, was an appeal in admiralty not from a sale but from the decree on the merits of the controversy, and the fund in dispute was in the registry of the court. As no interest had been allowed on the decree, and the costs were already provided for, the court held that the appellee had not suffered any damage by the delay.

Counsel for plaintiffs in error says—p. 15 of brief—that the defendant in the original case, Mr. Lucian Woodworth, had the right to prosecute his appeal. This is certainly true, but the appeal of itself gave no right to stay the execution of the order appealed from. To effect such a stay, the statute requires that good and sufficient security be taken, that if the appellant fail to make his plea good he will answer all damages and costs. The possession which the court awarded to the purchaser remained in the mortgagor by reason of the undertaking furnished. The bond stood in lieu of the possession, and now it is urged that because the order directing delivery of the possession was *stayed* by the bond, therefore it is as if such order had never been made. The real undertaking of the parties was to answer for the value of the posses-

sion, if appellant failed to make good his plea, as a condition to his retaining such possession.

Surely the language of the bond means something, and by it an obligation is imposed upon the signers to indemnify the appellee for whatever losses may be sustained by reason of the staying of execution upon the decree or order appealed from.

It is submitted that the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser is entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond, the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed, which was an appeal not from the foreclosure decree, but from the order of the court confirming the sale made under the decree. The question certified to this court by the circuit court of appeals for the eighth circuit, we submit, should be answered in the affirmative.

Respectfully submitted,

HOWARD KENNEDY, JR.,

Counsel for Defendant in Error and Appellee.